

***United States Court of Appeals
for the Second Circuit***



APPENDIX

B
Page 5

74-2489

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANONYMOUS J. and ANONYMOUS R., Attorneys
Admitted to Practice in the State of New York,
Plaintiffs-Appellants,
against

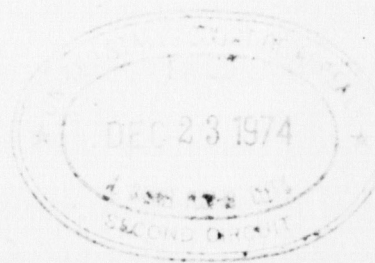
THE BAR ASSOCIATION OF ERIE COUNTY and
JOHN B. WALSH, General Counsel to the
General Preliminary Investigation,
Defendants-Respondents.

APPENDIX

GARVEY, MAGNER & SULLIVAN,
(PHILIP H. MAGNER, JR., Esq., *of Counsel*),
Attorneys for Plaintiff-Appellant J.,
1725 Statler Hilton Hotel,
Buffalo, New York 14202.

FLAHERTY & SHEA,
(THOMAS P. FLAHERTY, Esq., *of Counsel*),
Attorneys for Plaintiff-Appellant R.,
1412 Main Place Tower,
Buffalo, New York 14202.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-0487



PAGINATION AS IN ORIGINAL COPY

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United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK**CIV - 74 - 364**

CIVIL ACTION FILE NO. _____

**ANONYMOUS J. AND ANONYMOUS R.,
ATTORNEYS ADMITTED TO PRACTICE
IN THE STATE OF NEW YORK,**

**THE BAR ASSOCIATION OF WEST COUNTY
AND JOHN B. WELSH, GENERAL COUNSEL
TO THE GENERAL PRELIMINARY
INVESTIGATION**

Plaintiff

Defendant

To the above named Defendant, :

You are hereby summoned and required to serve upon **GARVEY, MAGNER & SULLIVAN,
Attorneys for Plaintiff ANONYMOUS J., and FLANNERY & SMITH, Attorneys
for Plaintiff ANONYMOUS R.,**

plaintiff's attorneys, whose addresses are: 1725 Statler Hilton Hotel, Buffalo,
New York and 1412 Main Place Tower, Buffalo, New York.

an answer to the complaint which is herewith served upon you, within **20** days after service of this
summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be
taken against you for the relief demanded in the complaint.

JOHN K. ADAMS

Clerk of Court.

Deputy Clerk.

Date: **Buffalo, New York****July 26, 1974**

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 12 of the Federal Rules of Civil Procedure.

Complaint.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ANONYMOUS R and ANONYMOUS J,
Attorneys Admitted to Practice in
the State of New York,

Plaintiffs

CIV - 74 - 364

-vs-

COMPLAINT

THE BAR ASSOCIATION OF ERIE COUNTY
and JOHN B. WALSH, General Counsel,
Office of General Preliminary Investigation

Defendants

Plaintiffs, by their attorneys, GARVEY, MAGNER & SULLIVAN
and FLAHERTY and SHEA, for their complaint herein, allege as follows:

JURISDICTION

1. This action arises under the Constitution and Laws of the United States and is brought under Amendments V and XIV of the Constitution and Title 28 United States Code §§1331, 1343, 2201 and 2202 to declare as unconstitutional and void and to restrain and enjoin the enforcement of Sections 90 and 476a of the Judiciary Law of the State of New York, the Canons of Professional Ethics and Rule 1022.9 of the Rules of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Department insofar as the same permit the use in disciplinary proceedings against attorneys of testimony elicited under a grant of immunity from prosecution following an attorney's exercise of his constitutional privilege against self-incrimination and thereby deny attorneys the equal protection of the law, and insofar as

Complaint.

the same permit the institution and prosecution of disciplinary proceedings against attorneys based upon conduct which was the subject of their prior testimony compelled by a grant to them of full transactional immunity.

2. The matter in controversy exceeds the sum of \$10,000.00 exclusive of interest and costs.

PARTIES

3. Plaintiffs, ANONYMOUS R and J, are attorneys and counselors at law duly admitted to practice in the State of New York with offices and a principal place of business in the City of Buffalo, County of Erie and State of New York.

4. Upon information and belief, Defendant, The Bar Association of Erie County, is an organization of attorneys with office and principal place of business in the Ellicott Square Building, in the City of Buffalo, County of Erie and State of New York and designated by law to investigate the conduct of attorneys, and where it deems appropriate to bring charges against attorneys and to seek imposition of punishment, penalties, and forfeitures against attorneys.

5. Upon information and belief, the Defendant, The Bar Association of Erie County, maintains an Office of General Preliminary Investigation in the Ellicott Square Building in the City of Buffalo, County of Erie and State of New York to assist in the activity of investigating and prosecuting attorneys.

Complaint.

6. Upon information and belief, that Defendant JOHN B. WALSH is the General Counsel to the General Preliminary Investigation in the investigation and prosecution of attorneys.

7. That prior to December 14, 1971, the Plaintiffs were summoned to testify before a Grand Jury constituted in the County of Erie and State of New York and requested to sign waivers of immunity.

8. That the Plaintiffs on advice of counsel declined to sign waivers of immunity or to testify upon the subject of said Grand Jury inquiry, claiming the full benefit of their rights and protections under the Constitutions of the United States and the State of New York.

9. That on or about December 14, 1971, the Plaintiffs appeared before said Grand Jury and were duly granted full transactional immunity without restriction or limitation by said Grand Jury upon the recommendation of the District Attorney of Erie County.

10. That having been granted immunity as aforesaid, Plaintiffs then testified fully, completely and truthfully as to the subject of the Grand Jury inquiry.

11. That thereafter, said Grand Jury returned an indictment against a single defendant, which indictment consisted of some 20 counts, and which named Plaintiff ANONYMOUS R as a co-conspirator.

12. That thereafter said indictment was brought on for trial and Plaintiffs were required to and did give testimony during said trial specifically upon the following dates:

Complaint.

May 31, June 1, June 4, 1973

before the County Court of Erie County, New York.

13. That said testimony was generally in accordance with their Grand Jury testimony and was fully, fairly and truthfully given.

14. That on or about the 11th day of June, 1974, Defendants commenced a disciplinary proceeding against Plaintiffs before the New York State Supreme Court, Appellate Division, 4th Department, by service of petitions, affidavits, and exhibits, all of which are incorporated by reference in this complaint.

15. That said disciplinary proceeding alleges that Plaintiffs herein violated the Penal Law of the State of New York and the Code of Professional Responsibility by reason of actions and conduct described in the testimony of Plaintiffs given before the Grand Jury and Trial Jury as aforesaid.

16. That said disciplinary proceeding is addressed to the power of the Appellate Division to discipline or disbar attorneys, and that Plaintiffs herein are by reason of said disciplinary proceeding, subject to penalties, forfeitures, deprivations, disbarment, suspension or other discipline including loss of license and livelihood.

17. That said disciplinary proceeding is based entirely upon the testimony of Plaintiffs herein before the Grand Jury and Trial Jury as aforesaid and after the grant of full transactional immunity.

Complaint.

18. That the disciplinary proceeding commenced against the Plaintiffs herein by the Defendants is violative of the rights of the Plaintiffs under the Constitution of the United States, and denies to the Plaintiffs due process of law and the equal protection of the law.

19. That Plaintiffs have no adequate remedy at law.

20. That Plaintiffs have no adequate remedy before the Courts of the State of New York because said Courts have uniformly refused to apply the provisions and protections of the United States Constitution in disciplinary proceedings against attorneys.

WHEREFORE, Plaintiffs pray:

(a) For an order granting a preliminary injunction in this action enjoining Defendants, their representatives, agents and employees, and all those acting in concert with them from proceeding with disciplinary proceedings against Plaintiffs pending entry of final judgment herein; and

(b) For entry of final judgment enjoining Defendants, their representatives, agents and employees, and all those acting in concert with them from proceeding with disciplinary proceedings against Plaintiffs; and

(c) For entry of final judgment declaring that attorneys may not be subjected to disciplinary proceedings on the basis of judicially compelled testimony elicited under grants of immunity and permanently enjoining Defendants, their representatives, agents and employees, and all those acting in concert with them, from disciplining

Complaint.

Plaintiffs on the basis of such compelled testimony; and

(d) For such other and further relief as to the Court may seem just and proper in the premises, including the costs and disbursements of this action.

Dated: Buffalo, New York
July 26, 1974

GARVEY, MAGNER & SULLIVAN
Attorneys for Plaintiff ANONYMOUS J

By: 

A Member of the Firm
Office & Post Office Address
1725 Statler Hilton Hotel
Buffalo, New York 14202
(716) 856-8480

FLAHERTY and SHEA
Attorneys for Plaintiff ANONYMOUS R

By: 

A Member of the Firm
Office & Post Office Address
1412 Main Place Tower
Buffalo, New York 14202
(716) 852-5200

Order to Show Cause With Stay.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ANONYMOUS J. and ANONYMOUS R.
ATTORNEYS ADMITTED TO PRACTICE
IN THE STATE OF NEW YORK,

Plaintiffs,

-against-

THE BAR ASSOCIATION OF ERIE COUNTY
AND JOHN B. WALSH, GENERAL COUNSEL
TO THE GENERAL PRELIMINARY
INVESTIGATION,

Defendants.

ORDER TO SHOW CAUSE
WITH STAY

74 Civ. 364

Upon the annexed Affidavit of THOMAS P. FLAHERTY, Esq.,
sworn to the 26th day of July, 1974, and the Summons and Complaint
heretofore filed herein, it is

ORDERED, that defendants SHOW CAUSE before this Court
at Part I thereof, to be held in Room , United States Court-
house, Niagara Square, in the City of Buffalo, County of Erie
and State of New York, on the ^{August} ✓ day of ~~July~~, 1974, at 11
o'clock in the forenoon of that day, or as soon thereafter as
counsel may be heard, why an order should not be made and entered
herein pursuant to Federal Rule Civil Procedure 65 (a) granting
plaintiffs a preliminary injunction enjoining defendants, their
representatives, agents and employees, and all those acting in
concert with them, from prosecuting or otherwise maintaining any
disciplinary proceedings against the plaintiffs pending the entry
of final judgment herein based upon transactions and proceedings
in which plaintiffs had been immunized and predicated upon com-

Order to Show Cause With Stay.

pelled testimony elicited from such plaintiffs by means of a grant of immunity, such prosecution being repugnant to Amendments V and XIV of the Constitution of the United States, and for such other and further relief as to the Court may seem just and proper; and it is further

JE
~~ORDERED, that until the hearing and determination of this motion the defendants, their representatives, agents and employees, and all those acting in concert with them, be and they hereby are stayed pursuant to F.R. Civ. Proc. 65 (b) from proceeding with disciplinary proceedings now pending against plaintiffs; and it is further~~

ORDERED, that service upon JOHN B. WALSH, Esq., counsel to the BAR ASSOCIATION OF ERIE COUNTY and General Counsel to the General Preliminary Investigation of a copy of this Order, annexed affidavit and summons and complaint on or before the day of July, 1974, at 5:00 P.M., be deemed good and sufficient service thereof.

Dated: Buffalo, New York

29 July , 1974.

John J. Curtin

U.S.D.J.
Western District of New York

ANONYMOUS J. and ANONYMOUS R.
ATTORNEYS ADMITTED TO PRACTICE
IN THE STATE OF NEW YORK,

-against-

THE BAR ASSOCIATION OF ERIE COUNTY
AND JOHN B. WALSH, GENERAL COUNSEL
TO THE GENERAL PRELIMINARY
INVESTIGATION,

Defendants.

STATE OF NEW YORK)
) SS.:
COUNTY OF ERIE)

THOMAS P. FLAHERTY, being duly sworn, deposes and says:

1. Deponent is an attorney duly admitted to practice before the Courts in the State of New York and the United States District Court for the Western District of New York.

2. Said deponent is a member of the firm of FLAHERTY & SHEA, attorneys for the plaintiff R. herein, and maintaining offices for the practice of law at 1412 Main Place, in the City of Buffalo, County of Erie and State of New York.

3. That in such capacity deponent is fully familiar with the facts and circumstances underlying this action.

4. This Affidavit is submitted in support of the motion by both plaintiffs, brought on by Order to Show Cause, for a temporary restraining order and preliminary injunction.

Affidavit of Thomas P. Flaherty.

5. During the summer of 1971 and thereafter, the Erie County District Attorney's Office commenced an investigation into alleged irregularities in the handling and disposition of certain traffic matters in the City Court of Buffalo.

6. The results of that investigation were ultimately turned over and presented to an Erie County Grand Jury.

7. On December 14, 1971, the plaintiffs, both then represented by deponent, were called before that Grand Jury and interrogated by Michael F. Dillon, Esq., Erie County District Attorney. They were questioned concerning their relationship with certain clients and their possible relationship with others who were the subject matter of the probe in progress.

8. When requested to execute a waiver of immunity prior to such testimony, both plaintiffs, through their attorney, refused to do so on the advice of counsel.

9. On information and belief, the District Attorney informed the Grand Jury of this decision and said Grand Jury approved the granting of transactional immunity to both plaintiffs in exchange for their testimony.

10. On being so advised of the full and complete immunity extended to them, both plaintiffs, without executing waivers of immunity, were taken before the Grand Jury and testified.

11. Subsequently such Grand Jury returned an indictment against an individual and he was brought to trial thereon.

12. Having been immunized by the Grand Jury the plaintiffs were called upon and in fact did testify at that trial on May 31, June 1, and June 4, 1973.

13. On or about the 11th day of June, 1974, over a year after their trial testimony above referred to, and two and one-half

Affidavit of Thomas P. Flaherty.

years after their Grand Jury testimony, plaintiff, ANONYMOUS J., and plaintiff, ANONYMOUS R., were served with a petition and notice of motion instituted by the BAR ASSOCIATION OF ERIE COUNTY which named both of them and seeks to have them disciplined. Plaintiff, ANONYMOUS R., was also served with a separate petition and notice of motion, naming him alone and seeking the same punishment.

14. On information and belief, the defendants conducted no investigation, interrogated no witnesses and held no hearings whatsoever on the subject matter contained in said petitions but prepared them and the charges therein contained wholly and solely from the immunized testimony of plaintiffs given at the trial as heretofore described.

15. The plaintiffs are charged with violating the provisions of the Penal Law of the State of New York and various canons of the Code of Professional Responsibility, particularly, Sections 115.00; 100.05; and 105.05 of the Penal Law of the State of New York, and Canons 1, 6, 7, 8 and 9 of the Code of Professional Responsibility.

16. The motions on said petitions were made returnable on the 25th day of June, 1974, before the State of New York, Supreme Court, Appellate Division, Fourth Department.

17. Deponent, as attorney, appeared on the return date of said motion, generally on behalf of ANONYMOUS R., and specially on behalf of ANONYMOUS J., who had decided to retain separate counsel and had not as of that time done so.

18. Deponent requested at that appearance, an adjournment with leave to file an answer to the petitions or otherwise move with respect thereto. The Appellate Division, Fourth Department extended the time of plaintiffs in this regard to August 1, 1974, preserving all rights of the plaintiffs in the interim.

Affidavit of Thomas P. Flaherty.

19. It is clear that the plaintiffs had no choice but to testify before the Erie County Grand Jury and at the subsequent trial on the indictment returned by that body when District Attorney Dillon granted to each of them what is tantamount to transactional immunity. To have failed to testify would have resulted in a contempt citation and inevitable conviction thereon. Having so testified, plaintiffs are now faced, after the time period delay referred to, with disciplinary proceedings based upon their immunized testimony with petitions grounded entirely upon their compelled testimony which can result in their disbarment. It is submitted that disciplinary proceedings of this type are criminal in nature and as such entitled to the same Constitutional protections as are afforded in criminal cases. Plaintiffs have at stake substantial rights in the nature of their ability to continue professionally and earn their livelihood. To permit the Bar Association of Erie County and then the New York State Courts to proceed against attorneys after they have been lawfully granted transactional immunity, and base disciplinary proceeding petitions solely on their compelled testimony given under grants of immunity, subverts the nature and intent of the Fifth Amendment privilege against self-incrimination.

20. The plaintiffs are proceeding herein by Order to Show Cause to secure a stay of the disciplinary proceedings now pending against them. Since both plaintiffs are members of the Bar of the State of New York with offices in Erie County, they remain at all times subject to the jurisdiction of the State Courts and there is no prejudice to the defendants as the result of the stay or preliminary injunction sought by this motion. Since the Bar Association elected to delay for the period of time here involved after the operative events to bring on these disciplinary pro-

Affidavit of Thomas P. Flaherty.

ceedings, what possible prejudice or harm can result from the short period of time involved for the Federal Court to determine the Constitutional propriety of its proceeding in the first instance.

21. The summons, complaint and these motion papers do not set forth the names of the plaintiffs in order to avoid irreparable harm and injury to them which would necessarily accompany such revelation. General public knowledge of the proceedings by the Bar Association will have an obvious adverse effect upon their reputations and practices. Deponent is submitting to the Court at this time, a letter disclosing the identity of the plaintiffs and copies of their pending petitions and respectfully request that such information be treated in a confidential manner. The defendants have been advised of the institution of this action and motion and are of course fully aware of the identity of the plaintiffs.

22. No previous application has been made for the relief sought herein.

Thomas P. Flaherty
Thomas P. Flaherty

Sworn to before me this
26th day of July, 1974.

James P. Shea
NOTARY PUBLIC - ERIE COUNTY

JAMES P. SHEA
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 20, 1975

Notice of Motion & Motion to Dismiss, etc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ANONYMOUS R and ANONYMOUS J
Attorneys Admitted to Practice in
the State of New York,

Plaintiffs,

vs.

THE BAR ASSOCIATION OF ERIE COUNTY
and JOHN B. WALSH, General Counsel,
Office of General Preliminary
Investigation,

Defendants.

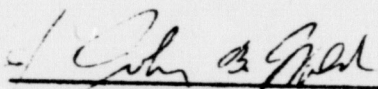
CIVIL ACTION NO. 74-364

NOTICE OF MOTION AND MOTION
TO DISMISS COMPLAINT FOR
FAILURE TO STATE CLAIM AND
LACK OF JURISDICTION UNDER
RULE 12 (b) OF THE FEDERAL
RULES OF CIVIL PROCEDURE

The defendant moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.
2. To dismiss the action on the ground that the court lacks jurisdiction of the subject matter.
3. Upon the annexed affidavit of John B. Walsh sworn to the 13th day of August, 1974 and the previously stated grounds to dismiss the motion in this matter for a preliminary injunction and for such other and further relief as to the Court may seem just and proper.

DATED: Buffalo, New York
August 13, 1974


JOHN B. WALSH

Attorney for Defendant
10 Ellicott Square Court
Buffalo, New York 14203

TO: PHILIP H. MAGNER, JR.
Attorney for Anonymous J
1725 Statler Hilton Hotel
Buffalo, New York
and
THOMAS P. FLAHERTY
Attorney for Anonymous R
1412 Main Place Tower
Buffalo, New York

PLEASE TAKE NOTICE, that the undersigned will bring the

Notice of Motion & Motion to Dismiss, etc.

above motion on for hearing before this Court at the United States Courthouse in Buffalo, New York on the 9th day of September, 1974 at 10:00 in the forenoon of that day or as soon thereafter as counsel can be heard.

John B. Walsh

JOHN B. WALSH
Attorney for Defendant
10 Ellicott Square Court
Buffalo, New York 14203

Affidavit of John B. Walsh.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ANONYMOUS R and ANONYMOUS J
Attorneys Admitted to Practice in
the State of New York,
Plaintiffs,
vs.

CIVIL ACTION NO. 74-364

AFFIDAVIT

THE BAR ASSOCIATION OF ERIE COUNTY
and JOHN B. WALSH, General Counsel,
Office of General Preliminary Investigation
Defendants.

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
CITY OF BUFFALO)

JOHN B. WALSH, being duly sworn deposes and says:

1. He is an attorney duly licensed to practice law in the State of New York, before this Court, the Second Circuit Court of Appeals and the Supreme Court of the United States and has offices at 10 Ellicott Square Building, Buffalo, New York and is the attorney for the Bar Association of Erie County in the above-captioned matter, in the disciplinary proceeding brought by the Bar Association of Erie County alluded to in the motion for preliminary injunction and the complaint in this matter, is a named co-defendant in this matter and is fully familiar with the facts.

2. Your deponent is not sure why he has been named as a co-defendant in this action since he is the attorney for the Bar Association in the proceeding sought to be enjoined by this action and cannot find any statement in the pleadings to indicate under what grounds he would be a defendant.

3. Your deponent also believes that since this is a

Affidavit of John B. Walsh.

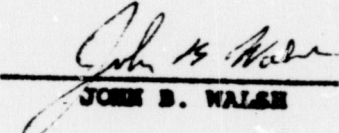
motion to dismiss for failure to state a claim, that it would be inappropriate for him to comment upon any of the facts stated in the complaint or the moving papers for the preliminary injunction even though there may be some discrepancies, however, your deponent wants to make it clear that he believes that the allegation in the complaint and moving papers that the plaintiffs have no adequate remedy before the Courts of the State of New York "because said Courts have uniformly refused to apply the provisions and protections of the United States Constitution in disciplinary proceedings against attorneys" is a conclusion of law and a matter of law and not a fact and not correct.

4. Your deponent would also like to bring to the court's attention that, as pleaded in the complaint, plaintiffs who are respondents in the disciplinary matters being sought to be enjoined herein, gave testimony in open court which was extensively reported in the newspapers. Such testimony and the identity of those who gave it, therefore, is hardly confidential or unknown to the public. In spite of this, the rule of confidentiality surrounding disciplinary proceedings in the State Courts of the State of New York as enunciated by Section 90 of the Judiciary Law of the State of New York has been followed in these cases by the defendants and the plaintiffs have failed to move to dismiss the proceeding or otherwise answer the petition in the State Court but have chosen to try to use this public forum procedure in their defense, rather than go through the normal course of procedure in the State Court system, and if necessary following that, then to the Supreme Court of the United States where the federal system is invoked as it pertains to state rulings on federal constitutional questions.

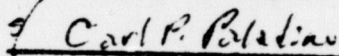
Affidavit of John B. Walsh.

5. Your deponent submits herewith his memorandum of law which sets forth his reasons why he believes this motion should be granted and the complaint and motion of the plaintiffs should be dismissed.

6. No previous application has been made for the relief requested herein.


JOHN B. WALSH

Sworn to before me
this 13 day of August, 1974


Notary Public

DALE F. HANCOCK
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 22, 1976

Affidavit of Thomas P. Flaherty in Opposition
to Motion to Dismiss.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ANONYMOUS R and ANONYMOUS J
Attorneys Admitted to Practice in
The State of New York,

Plaintiffs

vs.

AFFIDAVIT IN OPPOSITION
TO MOTION TO DISMISS

THE BAR ASSOCIATION OF ERIE COUNTY
and JOHN B. WALSH, General Counsel,
Office of General Preliminary Investigation

Defendants

STATE OF NEW YORK)
COUNTY OF ERIE) SS

THOMAS P. FLAHERTY, being duly sworn, deposes and says:

1. That your deponent is an attorney admitted to practice his profession in the State of New York and admitted to practice before the United States District Court for the Western District of New York; that your deponent is a member of the lawfirm of FLAHERTY & SHEA, maintaining offices at 1412 Main Place, in the City of Buffalo, County of Erie and State of New York; that said lawfirm represents Plaintiff, R. in the above-entitled matter and your deponent is fully familiar with all the facts and circumstances involved herein.

2. That your deponent makes this affidavit on behalf of Plaintiffs R and J, in opposition to the motion of defendants for an Order dismissing the Complaint herein on the grounds that it is allegedly fails to state a cause of action and that this Court lacks jurisdiction.

3. That this action was commenced with the filing of the Complaint in the office of the Clerk of the United States District Court for the Western District of New York, on or about the 26th day of July, 1974. That a copy of said Complaint is attached hereto and made a part hereof.

Affidavit of Thomas P. Flaherty in Opposition
to Motion to Dismiss.

4. That contemporaneously with the service of this affidavit, the Plaintiffs will cause to be served a first amended complaint in the form annexed which asserts Title 42 United States Code § 1983, as an additional basis for jurisdiction and relief.

5. That this action, together with the Order to Show Cause granted on July 29, 1974, seeks both interlocutory and final relief enjoining the defendants and those acting in concert with them, from pursuing disciplinary action against these plaintiffs, on the grounds that the subject of said proceedings is, allegedly, conduct which was the subject of the plaintiffs' testimony before Erie County Grand and Trial Juries, for which they were both granted full and complete transactional immunity. That the attention of the Court is respectfully directed to the affidavit of your deponent, sworn to July 26, 1974, and attached to the aforesaid Order to Show Cause, which is incorporated herein by reference, for a more complete recitation of the factual background of this action.

6. That in cases involving the same or similar facts as those herein, the Courts of the State of New York have consistently and uniformly refused, failed and neglected to recognize and/or apply the Constitutional rights and safeguards incident to compelled testimony to attorneys who have been granted immunity with respect to the conduct then under investigation. That it is the considered opinion of your deponent that to proceed in the State Courts would be futile and most damaging to the professional reputations and livelihoods of the plaintiffs.

7. That the affidavit in support of the said defendants motion contains lengthy assertions as to the alleged

Affidavit of Thomas P. Flaherty in Opposition
to Motion to Dismiss.

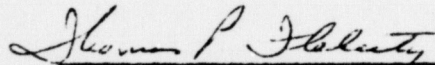
publicity attendant to the testimony of the plaintiffs, as it relates to their alleged conduct which is the subject of the disciplinary proceeding (See Paragraph 4 of Affidavit of John B. Walsh). That your deponent respectfully contends that such allegations are wholly irrelevant and immaterial to the ultimate determination of this motion.

8. That the Complaint (including the Amended Complaint) states a legitimate and real claim under the Constitution of the United States and applicable statutes and these plaintiffs will suffer great and irreparable injury if the relief herein demanded is not granted.

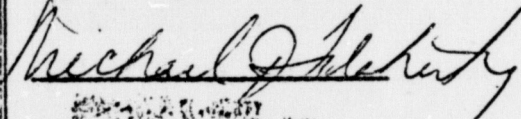
9. That this Court has the necessary jurisdiction to hear and determine the subject matter of this cause of action.

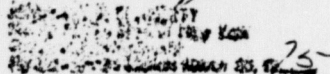
10. That submitted herewith is the brief of the plaintiffs in opposition to the subject motion.

WHEREFORE, your deponent prays for an Order of this Court denying the motion of the defendants in all respects.


Thomas P. Flaherty

Sworn to before me this
day of September, 1974.




25

First Amended Complaint.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ANONYMOUS R and ANONYMOUS J
Attorneys Admitted to Practice in
the State of New York,

Plaintiffs

CIV -74- 364

vs.

FIRST AMENDED COMPLAINT

THE BAR ASSOCIATION OF ERIE COUNTY
and JOHN B. WALSH, General Counsel,

Office of General Preliminary Investigation,

Defendants

Plaintiffs, by their attorneys, GARVEY, MAGNER &
SULLIVAN and FLAHERTY and SHEA, for their first Amended Complaint
herein, allege as follows:

JURISDICTION

1. This action arises under the Constitution and Laws of the United States and is brought under Amendments V and XIV of the Constitution, Title 28 United States Code §§ 1331, 1343, 2201 and 2202, and Title 42 of the United States Code § 1983, to declare as unconstitutional and void and to restrain and enjoin the enforcement of Sections 90 and 476a of the Judiciary Law of the State of New York, the Canons of Professional Ethics and Rule 1022.7 of the Rules of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Department insofar as the same permit the use in disciplinary proceedings against attorneys of testimony elicited under a grant of immunity from prosecution following an attorney's exercise of his constitutional privilege against self-incrimination and thereby deny attorneys the equal protection of the law, and insofar as the same permit the institution and prosecution of disciplinary proceedings against attorneys based upon conduct which was the

First Amended Complaint.

subject of their prior testimony compelled by a grant to them of full transactional immunity.

2. The matter in controversy exceeds the sum of \$10,000.00 exclusive of interest and costs.

PARTIES

3. Plaintiffs, ANONYMOUS R & J, are attorneys and counselors at law duly admitted to practice in the State of New York, with offices and a principal place of business in the City of Buffalo, County of Erie and State of New York.

4. Upon information and belief, Defendant, the Bar Association of Erie County, is an organization of attorneys with office and principal place of business in the Ellicott Square Building, in the City of Buffalo, County of Erie and State of New York, and designated by law to investigate the conduct of attorneys, and where it deems appropriate, to bring charges against attorneys and to seek imposition of punishment, penalties and forfeitures against attorneys.

5. Upon information and belief, the Defendant, The Bar Association of Erie County, maintains an Office of General Preliminary Investigation in the Ellicott Square Building in the City of Buffalo, County of Erie and State of New York to assist in the activity of investigating and prosecuting attorneys.

6. Upon information and belief, the Defendant JOHN B. WALSH is the General Counsel to the General Preliminary Investigation in the investigation and prosecution of attorneys.

7. That prior to December 14, 1971, the Plaintiffs were summoned to testify before the Grand Jury constituted in the County of Erie and State of New York and requested to sign waivers of immunity.

First Amended Complaint.

8. That the Plaintiffs on advice of counsel declined to sign waivers of immunity or to testify upon the subject of said Grand Jury inquiry, claiming the full benefit of their rights and protections under the Constitutions of the United States and the State of New York.

9. That on or about December 14, 1971, the Plaintiffs appeared before said Grand Jury and were duly granted full transactional immunity without restriction or limitation by said Grand Jury upon the recommendation of the District Attorney of Erie County.

10. That having been granted immunity as aforesaid Plaintiffs then testified fully, completely and truthfully as to the subject of the Grand Jury inquiry.

11. That, thereafter, said Grand Jury returned an indictment against a single defendant, which indictment consisted of some 20 counts, and which named Plaintiff ANONYMOUS R as a co-conspirator.

12. That thereafter said indictment was brought on for trial and Plaintiffs were required to and did give testimony during said trial, specifically upon the following dates: May 31, June 1, and June 4, 1973, before the County Court of Erie County, New York.

13. That said testimony was generally in accordance with their Grand Jury testimony and was fully, fairly and truthfully given.

14. That on or about the 11th day of June, 1974, Defendants commenced a disciplinary proceeding against Plaintiffs before the New York State Supreme Court, Appellate Division, 4th Department, by service of petitions, affidavits, and exhibits, all

First Amended Complaint.

of which are incorporated by reference in this Complaint.

15. That said disciplinary proceeding alleges that Plaintiffs herein violated the Penal Law of the State of New York and the Code of Professional Responsibility by reason of the actions and conduct described in the testimony of Plaintiffs given before the Grand Jury and Trial Jury as aforesaid.

16. That said disciplinary proceeding is addressed to the power of the Appellate Division to discipline or disbar attorneys, and that Plaintiffs herein are by reason of said disciplinary proceeding, subject to penalties, forfeitures, deprivations, disbarment, suspension or other discipline, including loss of license and livelihood.

17. That said disciplinary proceeding is based entirely upon the testimony of Plaintiffs herein before the Grand Jury and Trial Jury as aforesaid and after the grant of fully transactional immunity.

18. That the disciplinary proceeding commenced against the Plaintiffs herein by the Defendants is violative of the rights of the Plaintiffs under the Constitution of the United States, the statutes in such cases made and provided, and denies to the Plaintiffs due process of law and equal protection of the law.

19. That Plaintiffs have no adequate remedy at law.

20. That Plaintiffs have no adequate remedy before the Courts of the State of New York because said Courts have uniformly refused to apply the provisions and protections of the United States Constitution in disciplinary proceedings against attorneys.

First Amended Complaint.

WHEREFORE, Plaintiffs pray:

(a) For an Order granting a preliminary injunction in this action enjoining Defendants, their representatives, agents and employees, and all those acting in concert with them from proceeding with disciplinary proceedings against Plaintiffs pending entry of final judgment herein; and

(b) For entry of final judgment enjoining Defendants, their representatives, agents and employees, and all those acting in concert with them from proceeding with disciplinary proceedings against Plaintiffs; and

(c) For entry of final judgment declaring that attorneys may not be subjected to disciplinary proceedings on the basis of judicially compelled testimony elicited under grants of immunity and permanently enjoining Defendants, their representatives, agents and employees, and all those acting in concert with them from disciplining Plaintiffs on the basis of such compelled testimony; and

(d) For such other and further relief as to the Court may seem just and proper in the premises, including the costs and disbursements of this action.

DATED: Buffalo, New York
September 5, 1974

GARVEY, MAGNER & SULLIVAN
Attorneys for Plaintiff
ANONYMOUS J

By:

A Member of the Firm
Office and Post Office Address
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Buffalo, New York 14202
(716) 856-8480

FLAHERTY and SHEA
Attorneys for Plaintiff
ANONYMOUS R

By:

A Member of the Firm
Office and Post Office
Address
1412 Main Place Tower
Buffalo, New York 14202
(716) 852-5200

Decision and Order.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ANONYMOUS R and ANONYMOUS J,
Attorneys Admitted to Practice in
the State of New York,

Plaintiffs

-vs-

Civil 74-364

THE BAR ASSOCIATION OF ERIE COUNTY
and JOHN B. WALSH, General Counsel,
Office of General Preliminary Investigation,

Defendants

APPEARANCES: FLAHERTY & SUDA (THOMAS P. FLAHERTY,
Esq., of Counsel), Buffalo, New York,
for Plaintiff R.

GARVEY, MAGNER & SULLIVAN (PHILIP H.
MAGNER, JR., Esq., of Counsel)
Buffalo, New York, for Plaintiff J.

JOHN B. WALSH, ESQ., Buffalo, New York,
for Defendants.

Plaintiffs are attorneys admitted to practice
in the State of New York, against whom disciplinary pro-
ceedings are pending brought by the Bar Association of
Erie County before the New York State Supreme Court,
Appellate Division, Fourth Department. Defendants are
the Bar Association and John B. Walsh, General Counsel

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to the Bar Association's Committee on Grievances. Plaintiffs seek injunctive relief against defendants' using grand jury testimony given by plaintiffs under a grant of immunity in the disciplinary proceedings. Plaintiffs claim that the proposed use of compelled testimony violates their fifth amendment right against self-incrimination, held applicable to the states by the fourteenth amendment. See Malloy v. Hogan, 378 U.S. 1 (1964). Federal jurisdiction is invoked pursuant to 28 U.S.C. §§1331, 1343 and 2201, et seq., and the federal Civil Rights Act, 42 U.S.C. §1983.

Before the court is plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss the action for failure to state a claim. Plaintiffs' motion is denied. Defendants' motion is granted.

On December 14, 1971, plaintiffs were called to testify before a grand jury investigating certain alleged irregularities in the disposition of certain traffic matters in Buffalo City Court. Plaintiffs declined to execute written waivers of immunity on the advice of counsel. The grand jury then voted them full

Decision and Order.

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and complete transactional immunity. Plaintiffs then were taken before the grand jury and testified. Subsequently the grand jury returned one indictment against one individual and, at the trial, plaintiffs were called as witnesses and gave testimony under the grant of immunity. Plaintiffs testified on May 31, June 1 and June 4, 1973 in Erie County Court.

Approximately on June 11, 1974, the defendant Bar Association of Erie County commenced a disciplinary proceeding against plaintiffs, with defendant John B. Walsh acting as its counsel before the New York State Supreme Court, Appellate Division, Fourth Department. In its petition the Bar Association alleged that the plaintiffs violated the Penal Code of the State of New York and the Code of Professional Responsibility by reason of actions and conduct described in the testimony of plaintiffs given before the grand jury and trial jury. The defendants' motions and petitions were returnable on June 25, 1974 before the Appellate Division. The return date was adjourned to August 1, 1974, since attended to September 10, 1974.

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Defendants did not hold any hearings for the preparation of the petitions. Plaintiffs' allegation (which must be accepted as true at this stage of the proceedings) is that the charge contained in the petitions derived wholly and solely from the immunized trial testimony of plaintiffs.

Plaintiffs' complaint is dismissed for insufficiency, under the doctrine of Younger v. Eavis, 401 U.S. 37 (1971). The disciplinary proceedings in the instant case were commenced on June 11, 1974. The summons and complaint in the federal action were filed on July 26, 1974. Therefore, the state prosecution was pending so as to make federal intervention inappropriate. Perer v. Ledema, 401 U.S. 82, 103 (1971) (Brennan, J. concurring). Further, the pending state bar disciplinary proceeding is quasi-criminal in nature. In Re Buffalo, 390 U.S. 544, 551 (1968); Erdmann v. Stevens, 458 F.2d 1205, 1209 (2d Cir. 1972), cert. denied, 409 U.S. 889 (1972). See also Place and Bloom, Mental Fitness Requirements for the Practice of Law, 23 Buffalo L. Rev. 579, 595 (1974). As Judge Greise so ably pointed out,

Decision and Order.

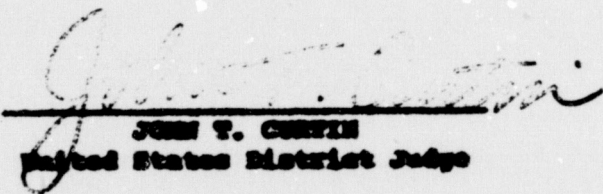
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Briggs is still the rule in this Circuit and its holding that federal courts should not intervene in a pending state bar disciplinary proceeding binds this court.

Anderson v. Jones, of Bar of City of New York, et al., 74 Civ. 2398 (S.D.N.Y. July 31, 1974). This court adopts the reasoning of Anderson, encl.

Defendants' motion to dismiss the complaint is granted, without prejudice.

So ordered.


JOHN T. CURTIN
United States District Judge

MAILED: October 17, 1974

Notice of Appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ANONYMOUS R, and
ANONYMOUS J,

Plaintiff Appellants

v.

THE BAR ASSOCIATION OF ERIE COUNTY, and
JOHN B. WALSH, General Counsel
Office of General Preliminary Investigation,

Defendant Appellee

NOTICE OF
APPEAL

74-364

filed 10:51 AM
11/6/74 Fed
Dist Ct.
WJL

NOTICE IS HEREBY GIVEN, that Anonymous R, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the Order of the Hon. John T. Curtin, denying the said plaintiff's motion for an Order temporarily restraining the defendants, the Bar Association of Erie County and John B. Walsh, General Counsel, Office of General Preliminary Investigation, from proceeding with disciplinary proceedings against him and from each and every part of that order entered herein on the 17th day of October, 1974.

FLAHERTY & SNEA
1412 Main Place Tower
Buffalo, New York 14202
Attorneys for the Appellant Anonymous R

By: Thomas P. Flaherty
Thomas P. Flaherty,
A member of the firm

Notice of Appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ANONYMOUS R, and
ANONYMOUS J,

Plaintiff Appellants

v.

THE BAR ASSOCIATION OF ERIE COUNTY, and
JOHN B. WALSH, General Counsel
Office of General Preliminary Investigation,

Defendant Appellee

NOTICE OF
APPEAL

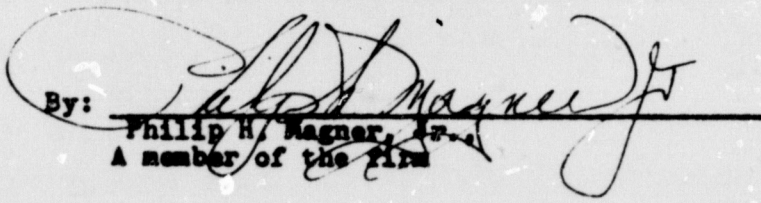
74-364

filed 10:50 A.M.
11/6/74 Fed
Dist Ct
Wosh

NOTICE IS HEREBY GIVEN, that Anonymous J, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the order of the Hon. John T. Curtin, denying the said plaintiff's motion for an order temporarily restraining the defendants, the Bar Association of Erie County and John B. Walsh, General Counsel, Office of General Preliminary Investigation, from proceeding with disciplinary proceedings against him and from each and every part of that order entered herein on the 17th day of October, 1974.

GARVEY, MAGNER & SULLIVAN
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Buffalo, New York 14202
Attorneys for the Appellant Anonymous J

By:


Philip H. Magner, Jr.
A member of the firm

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: Anonymous J. et al

v

The Bar Association of Erie County et al
Docket No. 74-2489

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

On the 20 day of December, 19 74
I mailed 3 copies of a printed Appendix ~~in~~ and Brief
the above case, in a sealed, postpaid wrapper, to:

John B. Walsh, Esq.

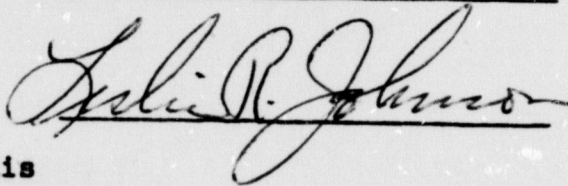
10 Ellicott Square Court

Buffalo, New York 14203

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
about 4:00 P.M. on said date at the request of:

James I. Myers, Esq.

120 Delaware Avenue, Buffalo, New York 14202



Sworn to before me this

20 day of December, 19 74

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1975